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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 33

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
and
BRIEF OF THE REPUBLIC OF PANAMA AS *AMICUS CURIAE*

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The Republic of Panama respectfully moves for leave to file a brief *amicus curiae*. Petitioner has consented to the filing of such a brief. Respondents have not.

The Republic of Panama's brief will be limited to the basic issue of whether the Labor Management Relations Act, as amended [61 Stat. 136 (1947), 29 U. S. C. §§ 141-187] extends to foreign flag vessels and their foreign seamen working under foreign seamen's articles entered into abroad, the ships having temporarily come into American waters. This question arises as a result

of the July 7, 1961 decision of the Court of Appeals of the State of New York, reported at 10 N. Y. 2d 218, reversing (4 to 3) the July 6, 1960 (3 to 2) decision of the Appellate Division, First Judicial Department, holding that the Supreme Court, New York County (Greenberg, J.) had jurisdiction to restrain picketing of Petitioner's Liberian flag vessels. The Court of Appeals rested its decision on the exclusive primary competence—or jurisdiction—of the National Labor Relations Board over disputes "arguably" subject to the Labor Management Relations Act.

The Republic of Panama is gravely concerned over this decision which seriously threatens the sovereign jurisdiction of Panama over Panamanian flag vessels entering United States ports and could jeopardize the continued participation of Panamanian flag shipping in international commerce.

Although the instant case involves a Liberian flag vessel, this Court's decision will undoubtedly affect other foreign flag vessels such as those of Panama. Panama's interest is particularly direct because at this very moment the National Labor Relations Board has pending before it the question of its jurisdiction over three Panamanian flag vessels and their alien crew members. *Reynolds Metal Co. and Caribbean S.S. Corp., S. A. (International Maritime Workers Union)* (Cases Nos. 2-CA-7908, 2-RC-11278, 2-RC-11320). Furthermore, that Board recently asserted jurisdiction in another case involving a Panamanian flag vessel (*Eastern Shipping Corp.* 132 NLRB No. 72 (1961)). The New York Court of Appeals in the instant case relied upon the Board's exercise of jurisdiction in the

Eastern Shipping Corp. case and related foreign flag cases in reaching its conclusion that the dispute in the instant case was "arguably subject" to the Labor Board's jurisdiction.

Panama is most anxious to prevent any further usurpation of its sovereign rights over the internal affairs of its vessels, and to protect and maintain its exclusive jurisdiction and control over the seamen employed on such vessels, under generally recognized principles of international law.

The International Court of Justice in its Advisory Opinion of June 8, 1960 (*IMCO Constitution of The Maritime Safety Committee Case*, 1960 Am. Mar. Cas. 1005) recognized Panama to be the eighth largest shipowning nation in the world as of 1958. Panama has now dropped to twelfth position, largely as a consequence of the uncertainties as to the lawful limits of the American Labor Board's jurisdiction over foreign flag vessels.

Panama thus has a very real and direct interest in the clarification by this Court of the jurisdictional limits of the National Labor Relations Board. Panama therefore wishes to present its views to this Court and to call the Court's attention to certain established principles of international law and comity, the consideration of which is essential to the proper determination of jurisdictional rights as to foreign flag vessels. Panama believes that, possibly because of emphasis on other points, such principles of international law and comity were not fully developed and presented in the courts below, and doubts that they will be adequately developed and presented by the parties here.

For the foregoing reasons, the Government of Panama respectfully requests that this motion be granted.

Dated: June 28, 1962

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BRIEF OF THE REPUBLIC OF PANAMA AS *AMICUS CURIAE*

Statement

The Republic of Panama's interests in the instant case are important. Its sovereign jurisdiction over Panamanian flag vessels and the continued existence of the present Panamanian Merchant Marine would be immediately and seriously threatened if the basis claimed for the National Labor Relations Board's jurisdiction in the present dispute were upheld by this Court. It is the position of the Republic of Panama, as well as

that of the Petitioner, that under controlling principles of international law, the National Labor Relations Board's jurisdiction cannot extend to the labor relations of foreign flag vessels, as such matters fall within the exclusive sovereign jurisdiction of the flag State. Accordingly, the "arguably subject" doctrine as to the Labor Board's jurisdiction, relied upon by the New York Court of Appeals, must be confined to domestic industrial strife between American employers and employees; it has no application in the instant case.

The New York Court of Appeals decision, if sustained, would give rise to continuous conflicts between the United States and the foreign flag States which now exercise jurisdiction over labor relations on such vessels. It would serve to disrupt the free flow of international commerce and undermine the friendly relations between the United States and such foreign States as Panama.

The fundamental rules of international law, relied upon here, as well as the practical objectives of international commercial relations, require that the United States recognize the foreign State's sovereignty over the internal affairs of vessels of its flag, and that the United States refrain from the assertion of conflicting laws, regulations and controls over such vessels.

ARGUMENT

1. The United States Should Not Attempt to Regulate Labor Relations Which Are the Primary Concern of a Foreign Country.

The Republic of Panama submits that the decision of this Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), should be controlling here. As this Court held, after reviewing the legislative history of the Labor Management Relations Act, "what was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." 353 U. S. at 144. This holding precludes application of the Act to the foreign seamen on foreign flag ships.

Panama further submits that any attempt by the United States to project American labor laws on board foreign flag vessels would constitute a direct violation of international law and an infringement of the exclusive sovereign jurisdiction of the flag State over labor relations on such vessels.

Panama, in particular, considers any attempt by the United States to apply its labor laws to Panamanian flag vessels as constituting a direct offense to the sovereign rights of Panama to govern all such matters concerning the internal affairs of its vessels. The Panamanian Labor Code governs the employment of crews, seamen's contracts and all matters of labor relations on board Panamanian flag vessels, and all controversies arising with respect to such labor relations are subject to the jurisdiction of Panamanian labor courts. Panama's impressive body of labor laws regu-

lates such important areas as representation of seamen by unions, formation and organization of unions, permissible activities of unions, strikes, requirements of collective bargaining agreements, minimum age requirements, working hours, wages and overtime, vacations, and the care of sick and injured seamen.[1] Many of the provisions of the Panamanian labor laws conflict with and cannot be reconciled with the Labor Management Relations Act. Panama considers that it is not only its sovereign right but also its duty to regulate and control labor relations with respect to its vessels. Panama's jurisdiction over such labor relations is its exclusive prerogative.

The Government of Panama's refusal to recognize the National Labor Relations Board's arbitrary assertion of jurisdiction over Panamanian flag vessels, has been made clear by protests to the Department of State of the United States with respect to the case of *Eastern Shipping Corp.*, 132 NLRB No. 72 (1961). Similar representations were made by Panama with respect to the case of *Reynolds Metal Co. and Caribbean S. S. Corp. S.A.* (NLRB Cases Nos. 2-CA-7908, 2-RC-11278, 2-RC-11320), now pending before the Board.

Such laws as those of Panama governing labor matters on its flag vessels, are in perfect accord with the established principles of international law, as well as international custom, whereby civilized nations throughout the world recognize the vessel's nationality

[1] Labor Code of the Republic of Panama, especially Title XII and Art. 339 (Law No. 67 of November 11, 1947, and Law No. 7 of January 26, 1950, of The National Assembly of Panama). See also Manual for Masters and Seamen on Ships under the Panamanian Flag, at p. 120 *et seq.* (1949) and Supp. No. 1 (1950), by Carlos Berguido, Jr. and Jorge Fabrega for English translations of the Labor Code's governing provisions.

as that of the flag State and defer to the flag State's exclusive sovereign jurisdiction over all matters relating to the vessel's internal economy, including labor relations.

2. A Vessel's Flag Determines Her Nationality and the State With Exclusive Jurisdiction Over the Vessel's Internal Affairs.

The historical and universal rule of international law is that the vessel's nationality is determined by its flag.[2] No other method has yet been developed for determining nationality which seems either certain, practical, or consonant with established principles of international law.

The most recent authority in support of this rule is the Advisory Opinion of the International Court of Justice in the *IMCO Constitution of the Maritime Safety Committee Case*, 1960 Am. Mar. Cas. 1005 (June 8, 1960). See also *The Muscat Dhows Case (France v. Great Britain)* (1905), The Hague Court Reports 93, 96, 99 (Scott ed. 1916); Rienow, The Test of the Nationality of a Merchant Vessel 42-49, 73-78, 79-116, 187, 214, 218-219 (1937).

This rule was also adopted in such important maritime conventions as the Safety of Life at Sea Convention of June 10, 1948 (3 U. S. T. 3450; T. I. A. S. No. 2495) and the Load Line Convention of July 5, 1930, (47 Stat. 2228; T. S. No. 858), to which the United States and Panama, among other nations, are parties.

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[2] Technically registry determines nationality, and the flag is evidence of such nationality. However, customary reference is made to the flag as determining nationality, which implies proper registry. See Starke, Introduction to International Law, 209, n. 2. (4th ed. 1958).

And this Court has constantly recognized the vessel's nationality as determined by its flag. As the Court stated in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at 584:

> "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it."

Underlying the rule that ships have the nationality of the flag State is the basic principle of international law that jurisdiction over the vessel's internal affairs belongs exclusively to the State of the vessel's nationality.

The flag State's jurisdiction over the internal affairs of the vessel is well recognized by American judicial decisions.

As stated in the *Wildenhus's Case*, 120 U. S. 1 (1887) at 12:

> "[I]t was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

See also *St. Clair* v. *United States*, 154 U. S. 134, 152 (1894); *United States* v. *Flores*, 289 U. S. 137, 156-157 (1933); *Evangelinos* v. *Andreavapor Cia., Nav., S. A.*, 162 F. Supp. 520, 521 (S. D. N. Y. 1958).

The United States Government has consistently supported the international rule that ships have the nationality of the State whose flag they are entitled to fly. In fact, this rule and the rule of jurisdiction of the flag State over such ships, formed the basis for the United States support of the position of Panama and Liberia before the International Court of Justice in the proceedings relating to the above mentioned *IMCO Constitution of the Maritime Safety Committee Case*, 1960 Am. Mar. Cas. 1005. (Letter from U. S. Under Secretary of State, dated October 27, 1960, to the U. S. Attorney General, requesting that the United States file a brief *amicus* with the National Labor Relations Board in connection with the foreign flag cases then pending, in order to present the views of the Department of State. This letter is printed as Appendix A to the Brief of the United States, Intervenor as Amicus, dated November 1960, which was then filed with the Labor Board in the *Eastern Shipping Corp.* case and related cases (NLRB Cases Nos. 12-RC-415, 15-CA-1454, 12-CA-255, 2-RC-10379).)

Historically, the flag State's right to exercise exclusive jurisdiction over the internal affairs of its vessels was premised upon the theory of territorial extension; that is, the vessels were considered as part of the territory of the flag State.

However, this theory of territoriality has now largely given way to general acknowledgment of the flag State's jurisdiction for reasons of practical necessity.

As this Court pointed out in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at 585:

> "Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her."

Again, in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), this Court appeared mindful of the practical necessities of applying the constant law of the flag. The truisms there summarized have equal applicability to the instant case:

> "To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country." *Id.* at 384.

See also *The Fletero* v. *Arias*, 206 F. 2d 267, 272-273 (4th Cir. 1953).

The law of the flag has long provided a ready standard for determining the vessel's nationality and, through such nationality, the responsibility for and authority over the vessel. Without such an easily determined and fixed standard, the maritime nations of the world would have no generally acceptable yardstick by which to ascertain the nationality of the vessels and the sovereign authority over such vessels entering their ports. If the judicial and administrative agencies in Panama, Italy, Great Britain or other countries should refuse to recognize the nationality of foreign flag ves-

sels entering their ports, and in denying such recognition, seek to apply their own varying labor laws, it is not difficult to imagine the resulting constant conflicts as to jurisdiction which would have a withering effect upon international maritime commerce.

The practical considerations which support the exclusive jurisdiction of the flag State are not only present while the ship is in the foreign ports of the world but also while it is on the high seas. Practical necessity again requires that the applicable law which is to govern labor relations on board the vessel must be determined by a precise standard which is recognized by all nations since labor relations involve a continuing relationship between the master and crew at all times and wherever the ship may be.

Thus, throughout history the nations of the world have found it to their practical advantage to defer to the law of the flag State as the law to govern the internal management and labor relations on foreign flag vessels. This traditional restraint in the exercise of jurisdiction has served well to advance the mutual desires of all States for reciprocal recognition of their sovereign jurisdiction over their own flag vessels both on the high seas and in foreign ports, and to foster amicable and workable international commercial relations among all nations.

3. The American Contacts of Foreign Flag Vessels Are Neither Certain Nor Practical as Jurisdictional Standards to Govern Labor Relations on Such Vessels.

It was suggested by the Court below that so-called "contacts" of the foreign flag vessels with the United States should determine whether or not the American Labor Board had jurisdiction over such vessels under

the Labor Management Relations Act. We submit that any construction of the Act which would require its applicability to be determined by American contacts of the foreign flag vessels would prove to be wholly impractical and unrealistic. Consider, for example, the following American contacts:

(1) *Engagement in Commerce with the United States.* Suppose the Labor Board's jurisdiction were premised upon the foreign flag vessel's engagement in commerce with the United States or the percentage of calls at United States ports. What then happens when the vessel's passenger or freight routes are changed so that the vessel thereafter is continually engaged in trade solely between foreign ports? Foreign flag vessels are engaged in international shipping; the trade routes of a particular vessel change frequently, even from month to month, according to the dictates of international trade. A foreign passenger vessel engaged today in regular runs to New York, may tomorrow commence a regular "shuttle" service solely between Great Britain and Canada. Similarly, the foreign flag tanker now engaged in regular trade between the United States and Venezuela, may tomorrow be engaged in regular trade between Great Britain and the Persian Gulf. Are the applicable labor laws to change with the trade routes, as the "contacts" test would imply? To apply American labor laws on such vessels may well be to impose continuing regulation of the labor relations of vessels which, while in American ports momentarily, may spend most of their useful life in foreign waters.

Moreover, as this Court pointed out in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at 581:

> "Respondent places great stress upon the assertion that petitioner's commerce and contacts with

the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea."

(2) *An American Agent.* If the assertion of jurisdiction is to be in any way based upon the fact that the General Agent for the foreign flag vessel is American, then would not foreign nations be warranted in establishing similar tests and applying their own labor laws and regulations to American flag shipping lines which had subsidiary offices or agents within their territorial boundaries?

(3) *Stock Ownership.* It is sometimes suggested that if American citizens own a majority interest (51%) in the shipowning company, there is a basis for Labor Board jurisdiction. Yet this basis of asserting jurisdiction is wholly impractical. Stockholders' interests are subject to constant fluctuation. In many instances stock ownership is also difficult to ascertain. Shares may be held by nominees, or as bearer shares, or may be listed on foreign exchanges. Stockholders' control may also be difficult to measure, especially when there are various classes of voting, limited voting, and non-voting Common Stock issued to U. S. and foreign nationals. Preferred Stock (with various pre-emptive and/or conversion rights) and Convertible Debentures may be outstanding. Stockholders' rights may be affected by voting trusts, creditors' rights, pledges, escrow agreements, etc. Facts which would be difficult

to catalogue, ascertain and measure do not furnish a practical basis for determining jurisdiction over foreign flag vessels. (See Advisory Opinion of the International Court of Justice in the *IMCO Constitution of the Maritime Safety Committee Case*, 1960 Am. Mar. Cas. 1005 (June 8, 1960).)

(4) *Nationality of the Crew.* In the foreign flag cases now pending before this Court, the vessels' respective crews are all foreign nationals. The crew of any foreign flag vessel may be, and often is, a mixture of nationals, such as British, Greek, Dutch, Italian, German and Norwegian. Moreover, the crews may change from voyage to voyage or from port to port. If the United States is to assert labor jurisdiction over the foreign members of such crews, then each of the foreign States represented on the crews would logically be justified in asserting jurisdiction over American seamen on American flag vessels entering its ports.

International law has long been aware of the varying diversity of crew nationalities, and, as this Court recognized in *In re Ross*, 140 U. S. 453 (1891), the nationality of the vessel for jurisdictional purposes is attributed to all members of her crew. Also, to borrow from *Lauritzen* v. *Larsen*, 345 U. S. 571, 587 (1953), a foreign seaman's presence in the United States is "transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another."

(5) *The Contract of Employment.* To invoke the place of contracting as a basis for asserting jurisdiction would, as pointed out in *Lauritzen* v. *Larsen*, 345 U. S. 571, 588-589 (1953), be placing reliance upon a purely fortuitous contact with a particular country. A ship

takes on members of a crew in any port where it needs them. Therefore, seamen's contracts of employment are often concluded in many different countries. A ship could be subjected to a multitude of systems of law if the *lex loci contractus* were to govern. Thus, in international shipping the natural tendency is to incorporate into articles of employment the more constant law of the flag as governing seamen's employment, as this Court noted in *Lauritzen* v. *Larsen, ibid.*

In sum, the above-mentioned tests, and any combinations thereof, are neither constant, certain nor practical as jurisdictional standards with respect to labor relations on foreign flag vessels. To base jurisdiction upon any such standards would not only fail to solve the present issue, but would also create an untold number of new ones. International practices and international jurisprudence demonstrate that the assertion of such standards for the purpose of interfering with the flag State's sovereign jurisdiction over the vessel has been considered and rejected. The general acceptance of the flag State's law as governing civil matters, including labor relations, on board the vessel is based upon the simple fact that this law is constant, practical and certain in its application, wherever the vessel may be.

4. The Labor Management Relations Act Should Not Be Construed to Violate the Law of Nations.

The Labor Management Relations Act should not be construed in such a manner as would impute to the United States Congress a deliberate attempt to violate the long standing principle of international law upholding the flag State's jurisdiction over the internal affairs of its vessels.

As Chief Justice Marshall early declared in *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804):

> "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."

This venerable canon of statutory construction was recently reaffirmed by this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) at 577:

> "By usage as old as the Nation, such statutes [shipping laws of the United States] have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."

See also *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 381-383 (1959); *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285 (1949), and 1 Hyde, International Law Chiefly as Interpreted and Applied by the United States 727 (2d rev. ed. 1951).

The basis for this traditional canon was succinctly explained by Mr. Justice Day in *MacLeod* v. *United States*, 229 U. S. 416, 434 (1913) as "essential to the peace and harmony of nations. . . ."

We submit that the Court of Appeals of New York erred in applying the "arguably subject" rule of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959), as to the "exclusive primary competence" of the National Labor Relations Board. The "arguability" here, if any, is as to whether the scope and reach of the Labor Management Relations Act extends to govern foreign flag vessels when, under international law, jurisdiction over labor relations on such vessels is vested in the foreign flag State. Since the United States Congress has indicated no intention

whatsoever to violate such jurisdictional rights of the flag State, the American Labor Board would clearly appear to be without such jurisdiction, *ab initio*. (*Benz v. Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 144 (1957). See also *Foley Bros., Inc. v. Filardo*, 336 U. S. 281, 285-286 (1949).)

Any attempt by the United States to project the Labor Act on board foreign flag vessels so as to regulate labor relations can therefore justly be considered by the flag State to be an infringement of its sovereign rights, openly inviting protest and, possibly, retaliation.

As this Court forewarned in *Lauritzen v. Larsen* (345 U. S. 571 (1953) at 582):

> "[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

The Panamanian Government's protest to the United States Department of State on August 24, 1961, concerning the Labor Board's improper assertion of jurisdiction over a Panamanian flag vessel in the *Eastern Shipping Corp.* case, 132 NLRB No. 72 (1961), pointed out that if the United States maintains jurisdiction over labor relations on Panamanian flag ships entering its territorial waters, this may open the door to reprisals by Panama who could impose Panamanian laws on American flag vessels entering its territorial waters, including those embracing the maritime entrances of the Panama Canal.

Thus, this Court's expression of concern in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), was well justified:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Id.* at 147.

CONCLUSION

The flag State has sovereign and exclusive jurisdiction over the subject matter in this case. The jurisdiction of the National Labor Relations Board is therefore precluded.

Accordingly, the judgment of the Court of Appeals of the State of New York should be reversed and the cause remanded for further proceedings.

Dated: June 28, 1962

Respectfully submitted.

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